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GENERAL SERVICES ADMINISTRATION

41 CFR Part 105-60

[GSPMR Case 2016-105-1; Docket No. 2016-0004; Sequence No. 1]

Public Availability of Agency Records and Informational Materials; Technical Amendment

AGENCY: Office of Administrative Services (OAS), General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: GSA is amending the General Services Administration's regulations implementing the Freedom of Information Act (FOIA). The previous published final rule inadvertently excluded a subpart.

DATE: Effective: **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER.]**

FOR FURTHER INFORMATION CONTACT: Mr. Travis S. Lewis, Director of GSA, OAS, Freedom of Information Act Requester Service Center, at 202-219-3078 or via email at *travis.lewis@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite GSPMR Case 2016-105-1.

SUPPLEMENTARY INFORMATION:

I. Background

GSPMR Case 2016-105-1; Public Availability of Agency Records and Informational Materials was published in the **Federal Register** at 85 FR 5137 on January 29, 2020.

Subpart 41 CFR 105-60.6 was inadvertently excluded when GSA amended its regulations to incorporate changes brought about by changes to the Freedom of Information Act (FOIA) on January 29, 2020.

II. Discussion of Changes

GSA is issuing this technical amendment to reinstitute its regulations pertaining to the Production or Disclosure by Present or Former General Services Administration Employees in Response to Subpoenas or Similar Demands in Judicial or Administrative Proceedings. There is and was no amendment to the language of the specific regulations pertaining to the Production or Disclosure by Present or Former General Services Administration Employees in Response to Subpoenas or Similar Demands in Judicial or Administrative Proceedings. This technical amendment only reinstates the unchanged, aforementioned regulations as reflected in the background section.

This final rule reinstates Subpart 41 CFR 105-60.6, hereinafter Subpart L- 41 CFR-105-60.10, which regulates the Production or Disclosure by Present or Former General

Services Administration Employees in Response to Subpoenas or Similar Demands in Judicial or Administrative Proceedings.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives; and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Executive Order 13771

The General Services Administration certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because this editorial change does not have a significant impact on the public or Government.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant GSAR revision and 41 U.S.C. 1707 does not require publication for public comment.

VI. Paperwork Reduction Act

This final rule does not contain any information collection that requires additional approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. Chapter 35).

List of Subjects in 41 CFR Part 105-60

Administrative practice and procedure, Records, Information, Confidential business information, Freedom of Information Act, Privacy Act.

Emily W. Murphy,
Administrator.

For the reasons stated in the preamble, GSA revises 41 CFR part 105-60 to add Subpart L to read as follows:

PART 105-60—PUBLIC AVAILABILITY OF AGENCY RECORDS AND INFORMATIONAL MATERIALS

Subpart L 105-60.10—Production or Disclosure by Present or Former General Services Administration Employees in Response to Subpoenas or Similar Demands in Judicial or Administrative Proceedings

Sec.

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105-60.1002 Definitions.

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Authority: 5 U.S.C. 301 and 552; 40 U.S.C. 486(c).

§ 105-60.1001 Purpose and scope of subpart.

(a) By virtue of the authority vested in the Administrator of General Services by 5 U.S.C. 301 and 41 U.S.C. 121(c) this subpart establishes instructions and procedures to be followed by current and former employees of the General Services Administration in response to subpoenas or similar demands issued in judicial or

administrative proceedings for production or disclosure of material or information obtained as part of the performance of a person's official duties or because of the person's official status. Nothing in these instructions applies to responses to subpoenas or demands issued by the Congress or in Federal grand jury proceedings.

(b) This subpart provides instructions regarding the internal operations of GSA and the conduct of its employees, and is not intended and does not, and may not, be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against GSA.

§ 105-60.1002 Definitions.

For purposes of this subpart, the following definitions apply:

(a) *Material* means any document, record, file or data, regardless of the physical form or the media by or through which it is maintained or recorded, which was generated or acquired by a current or former GSA employee by reason of the performance of that person's official duties or because of the person's official status, or any other tangible item, e.g., personal property possessed or controlled by GSA.

(b) *Information* means any knowledge or facts contained in material, and any knowledge or facts acquired

by current or former GSA employee as part of the performance of that person's official duties or because of that person's official status.

(c) *Demand* means any subpoena, order, or similar demand for the production or disclosure of material, information or testimony regarding such material or information, issued by a court or other authority in a judicial or administrative proceeding, excluding congressional subpoenas or demands in Federal grand jury proceedings, and served upon a present or former GSA employee.

(d) *Appropriate authority* means the following officials who are delegated authority to approve or deny responses to demands for material, information or testimony:

(1) The Counsel to the Inspector General for material and information which is the responsibility of the GSA Office of Inspector General or testimony of current or former employees of the Office of the Inspector General;

(2) The Counsel to the GSA Board of Contract Appeals for material and information which is the responsibility of the Board of Contract Appeals or testimony of current or former Board of Contract Appeals employees;

(3) The GSA General Counsel, Associate General Counsel(s) or Regional Counsel for all material, information, or testimony not covered by paragraphs (d) (1) and (2) of this section.

§ 105-60.1003 Acceptance of service of a subpoena duces tecum or other legal demand on behalf of the General Services Administration.

(a) The Administrator of General Services and the following officials are the only GSA personnel authorized to accept service of a subpoena or other legal demand on behalf of GSA: The GSA General Counsel and Associate General Counsel(s) and, with respect to material or information which is the responsibility of a regional office, the Regional Administrator and Regional Counsel. The Inspector General and Counsel to the Inspector General, as well as the Chairman and Vice Chairman of the Board of Contract Appeals, are authorized to accept service for material or information which are the responsibility of their respective organizations.

(b) A present or former GSA employee not authorized to accept service of a subpoena or other demand for material, information or testimony obtained in an official capacity shall respectfully inform the process server that he or she is not authorized to accept service on behalf of

GSA and refer the process server to an appropriate official listed in paragraph (a) of this section.

(c) A Regional Administrator or Regional Counsel shall notify the General Counsel of a demand which may raise policy concerns or affect multiple regions.

§ 105-60.1004 Production or disclosure prohibited unless approved by the Appropriate Authority.

No current or former GSA employee shall, in response to a demand, produce any material or disclose, through testimony or other means, any information covered by this subpart, without prior approval of the Appropriate Authority.

§ 105-60.1005 Procedure in the event of a demand for production or disclosure.

(a) Whenever service of a demand is attempted in person or via mail upon a current or former GSA employee for the production of material or the disclosure of information covered by this subpart, the employee or former employee shall immediately notify the Appropriate Authority through his or her supervisor or his or her former service, staff office, or regional office. The supervisor shall notify the Appropriate Authority. For current or former employees of the Office of Inspector General located in regional offices, Counsel to the Inspector General shall be

notified through the immediate supervisor or former employing field office.

(b) The Appropriate Authority shall require that the party seeking material or testimony provide the Appropriate Authority with an affidavit, declaration, statement, and/or a plan as described in paragraphs (c) (1), (2), and (3) of this section if not included with or described in the demand. The Appropriate Authority may waive this requirement for a demand arising out of proceedings to which GSA or the United States is a party. Any waiver will be coordinated with the United States Department of Justice (DOJ) in proceedings in which GSA, its current or former employees, or the United States are represented by DOJ.

(c)(1) *Oral testimony.* If oral testimony is sought by a demand, the Appropriate Authority shall require the party seeking the testimony or the party's attorney to provide, by affidavit or other statement, a detailed summary of the testimony sought and its relevance to the proceedings. Any authorization for the testimony of a current or former GSA employee shall be limited to the scope of the demand as summarized in such statement or affidavit.

(2) *Production of material.* When information other than oral testimony is sought by a demand, the Appropriate

Authority shall require the party seeking production or the party's attorney to provide a detailed summary, by affidavit or other statement, of the information sought and its relevance to the proceeding.

(3) *Required plan or other information.* The Appropriate Authority may require a plan or other information from the party seeking testimony or production of material of all demands reasonably foreseeable, including, but not limited to, names of all current and former GSA employees from whom testimony or production is or will likely be sought, areas of inquiry, for current employees the length of time away from duty anticipated, and identification of documents to be used in each deposition or other testimony, where appropriate.

(d) The Appropriate Authority will notify the current or former employee, the appropriate supervisor, and such other persons as circumstances may warrant, whether disclosure or production is authorized, and of any conditions or limitations to disclosure or production.

(e) Factors to be considered by the Appropriate Authority in responding to demands:

(1) Whether disclosure or production is appropriate under rules of procedure governing the proceeding out of which the demand arose;

(2) The relevance of the testimony or documents to the proceedings;

(3) The impact of the relevant substantive law concerning applicable privileges recognized by statute, common law, judicial interpretation or similar authority;

(4) The information provided by the issuer of the demand in response to requests by the Appropriate Authority pursuant to paragraphs (b) and (c) of this section;

(5) The steps taken by the issuer of the demand to minimize the burden of disclosure or production on GSA, including but not limited to willingness to accept authenticated copies of material in lieu of personal appearance by GSA employees;

(6) The impact on pending or potential litigation involving GSA or the United States as a party;

(7) In consultation with the head of the GSA organizational component affected, the burden on GSA which disclosure or production would entail; and

(8) Any additional factors unique to a particular demand or proceeding.

(f) The Appropriate Authority shall not approve a disclosure or production which would:

(1) Violate a statute or a specific regulation;

(2) Reveal classified information, unless appropriately declassified by the originating agency;

(3) Reveal a confidential source or informant, unless the investigative agency and the source or informant consent;

(4) Reveal records or information compiled for law enforcement purposes which would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would be impaired;

(5) Reveal trade secrets or commercial or financial information which is privileged or confidential without prior consultation with the person from whom it was obtained; or

(6) Be contrary to a recognized privilege.

(g) The Appropriate Authority's determination, including any reasons for denial or limitations on disclosure or production, shall be made as expeditiously as possible and shall be communicated in writing to the issuer of the demand and appropriate current or former GSA employee(s). In proceedings in which GSA, its current or former employees, or the United States are represented by DOJ, the determination shall be coordinated with DOJ which may respond to the issuer of the subpoenas or demand in lieu of the Appropriate Authority.

§ 105-60.1006 Procedure where response to demand is required prior to receiving instructions.

(a) If a response to a demand is required before the Appropriate Authority's decision is issued, a GSA attorney designated by the Appropriate Authority for the purpose shall appear with the employee or former employee upon whom the demand has been made, and shall furnish the judicial or other authority with a copy of the instructions contained in this subpart. The attorney shall inform the court or other authority that the demand has been or is being referred for the prompt consideration by the Appropriate Authority. The attorney shall respectfully request the judicial or administrative authority to stay the demand pending receipt of the requested instructions.

(b) The designated GSA attorney shall coordinate GSA's response with DOJ's Civil Division or the relevant Office of the United States Attorney and may request that a DOJ or Assistant United States Attorney appear with the employee in addition to or in lieu of a designated GSA attorney.

(c) If an immediate demand for production or disclosure is made in circumstances which preclude the appearance of a GSA or DOJ attorney on the behalf of the employee or the former employee, the employee or former

employee shall respectfully make a request to the demanding authority for sufficient time to obtain advice of counsel.

§ 105-60.1007 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 105-60.606 pending receipt of instructions, or if the court or other authority rules that the demand must be complied with irrespective of instructions by the Appropriate Authority not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to comply, citing these instructions and the decision of the United States Supreme Court in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

§ 105-60.1008 Fees, expenses, and costs.

(a) In consultation with the Appropriate Authority, a current employee who appears as a witness pursuant to a demand shall ensure that he or she receives all fees and expenses, including travel expenses, to which witnesses are entitled pursuant to rules applicable to the judicial or administrative proceedings out of which the demand arose.

(b) Witness fees and reimbursement for expenses received by a GSA employee shall be disposed of in

accordance with rules applicable to Federal employees in effect at the time.

(c) Reimbursement to the GSA for costs associated with producing material pursuant to a demand shall be determined in accordance with rules applicable to the proceedings out of which the demand arose.

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